

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN L. LYONS,)	
)	
Plaintiff)	
)	
v.)	Civil No. 95-0194-B
)	
JESSE BROWN, et al.,)	
)	
Defendants)	

MEMORANDUM OF DECISION¹

Defendant Nikhil J. Pathak moves for summary judgment on Plaintiff's claim for defamation. Because the Court concludes that Plaintiff has no evidence that the statements upon which her claim is based were understood by the recipients of the statements to apply to Plaintiff, the Motion for Summary Judgment is hereby GRANTED.

Several of the factual assertions contained in Plaintiff's Statement of Material Facts (Docket No. 191) upon which Plaintiff bases her claim for defamation were scope certified by the Court's Order dated September 21, 1999.² These allegations are as follows:

4. Dr. Pathak wrote to the Chief of Staff, Chief of Medicine and the Chief of Nurses on August 8, 1994 stating he had been insulted and ridiculed by Kathy Lyons.

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

² Plaintiff asserts that Dr. Pathak cannot "shield himself from liability by claiming that . . . he was acting within the scope of his employment" with respect to the conduct set forth in these paragraphs, because the First Circuit Court of Appeals noted the Westfall Act would not protect him from conduct motivated by self-interest. Pltf. Memo. at 7 (unnumbered). This argument comes too late. This Court, following the directions provided by the circuit court on this issue, has already concluded that the conduct did occur within the scope of Defendant's employment. The Court will not revisit the question in the context of this Motion for Summary Judgment.

Deposition Exhibit 63. (Paragraphs 59, 61, 62, 63; Scope Certification Order at 2, 4, 8).

5. Dr. Pathak wrote to the Chief of Staff, Chief of Medicine and the Chief of Nurses on August 8, 1994 stating that Ms. Lyons denied him access to the unit.

Deposition Exhibit 63. (Paragraphs 59, 61, 62, 63; Scope Certification Order at 2, 4, 8).

6. Dr. Pathak wrote that he no longer had trust in the nursing staff and believed patient safety may be harmed. Deposition Exhibit 63. (Paragraphs 59, 61, 62, 63; Scope Certification Order at 2, 4, 8).

...

9. Dr. Pathak complained that Ms. Lyons would not take his critical lab values.

Pathak Deposition, pages 44-52, and pages 138-145. (Paragraph 55 of the Amended Complaint; Scope Certification Order at 2, 8).

10. Dr. Pathak discredited Ms. Lyons [sic] nursing competencies and undermined her authority with her staff by refusing to discuss with Ms. Lyons patient care and treatment issues which were properly within her purview as head nurse.

Deposition Exhibits 184 and 197. (Paragraph 55 of the Amended Complaint; Scope Certification Order at 2, 8).

The remaining factual allegations upon which Plaintiff may rest her claim for defamation read in their entirety as follows:

1. Dr. Pathak told Wendy McKinnon that his suspension was due to a false charge of sexual harassment. Pathak Deposition, Oct. 23, 1996, page 359.

2. Dr. Pathak told Ms. Chase that he was being suspended for a false accusation of sexual harassment. Pathak Deposition, Oct. 23, 1996, page 360.
3. Dr. Pathak told Sharon Cummings that he was being suspended because of a false accusation of sexual harassment. Pathak Deposition, Oct. 23, 1996, page 360.
- ...
7. Dr. Pathak wrote “It does strike me as a bit hypocritical for anybody in this hospital to say [sic] that they are busy with patients. Only a select few can ever make that statement, and I am at this [sic] time the ONLY person who has over past 20 years shown what a work-ethic patient care should be. But I do not see any point in this meaningless [sic] conversation [sic].” Deposition Exhibit 59.
8. Dr. Pathak forwarded this email message to the Chief of Nursing and Kathy Lyons’ supervisor, Marianne Taylor as well as Donna Hovey, Stacey Morrisette, Richard Steinberg and Eugene Beaupre, the Chief of Medicine. Deposition Exhibit 59.³

³ Defendant asserts that the conduct set forth in paragraphs 7 and 8 of Plaintiff’s Statement of Material Facts was also scope certified because the statements were written on July 22, and 25, 1994, thereby placing the message within paragraph 53 of the Amended Complaint, which alleges that Dr. Pathak engaged in a “continuing course of harassment . . . around work-related issues” during the three month period following the parties’ return from Chicago in June, 1994. Paragraph 53 was scope certified in the Court’s September 21 Order.

However, paragraph 157 of the Amended Complaint alleges that Defendant has, since July, 1994, “questioned Ms. Lyons’s professional judgment in front of staff to degrade her” That paragraph was not scope certified, and arguably it would also cover the conduct set forth in paragraphs 7 and 8 of the Statement of Material Facts. In light of the apparent conflict between these two allegations, the Court will treat paragraphs 7 and 8 as if they did not set forth certified

Although Plaintiff correctly states that the certified incidents might be admissible to show pattern or a course of conduct, it is these latter paragraphs that form the basis upon which to attach liability. As the First Circuit Court of Appeals stated, evidence of certified conduct might be admissible “merely to show pattern, motivation or anything else pertinent to imposing liability on the employee *for conduct that has not been certified*. *Lyons v. Brown*, 158 F.3d 605, 609 (1st Cir. 1998) (emphasis added and citation omitted).

Among the elements of a common law claim of defamation in this State is a requirement that the allegedly defamatory statements be “‘of and concerning’ the plaintiff.” *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991) (citing Restatement (Second) of Torts § 613(1)(c)). Further, the recipient of the statements must have understood that the statements were about Plaintiff. Restatement (Second) of Torts § 613(d). Plaintiff has offered no evidence that would permit a jury to conclude that the statements set forth in paragraphs 1 through 3 of her Statement of Material Facts were understood by the recipients to involve Plaintiff.

The statement presented in paragraph 7 of Plaintiff’s Statement of Material Facts simply cannot be interpreted as a false and defamatory statement concerning Plaintiff. Although it is clear from the exhibit itself, if not the Statement of Material Facts, that Defendant was responding directly to Plaintiff’s comment when he wrote the message, the response itself merely states his opinion that he is virtually the only person who can claim to give good patient care. This statement hardly impugns Plaintiff more than any of the other recipients of the message, or indeed any other employee of the hospital.

conduct for purposes of this Motion for Summary Judgment.

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *F.D.I.C. v. Anchor Properties*, 13 F.3d 27, 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)). Because Plaintiff has failed to offer evidence in support of essential elements of her claim, summary judgment is properly granted on that claim.

Conclusion

Accordingly, Defendant's Motion for Summary Judgment on Count VII of the Amended Complaint is hereby GRANTED.

SO ORDERED.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated on: April 10, 2000

U.S. District Court
District of Maine (Bangor)

TRIAL STNDRD

CIVIL DOCKET FOR CASE #: 95-CV-194

LYONS, et al v. VETERANS AFFAIRS SEC, et al	Filed: 08/30/95
Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK	ury demand: Plaintiff
Demand: \$400,000	Nature of Suit: 442
Lead Docket: None	Jurisdiction: US Defendant
Dkt# in other court: None	

Cause: 42:2003 Job Discrimination

KATHLEEN L LYONS
plaintiff

RICHARD L. O'MEARA
773-5651
[COR LD NTC]
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR LD NTC]
MEHNERT LAW OFFICES
P.O. BOX 1253
BOSTON, MA 02117
(617) 572-9285

v.

SECRETARY OF VETERANS AFFAIRS
defendant

DAVID R. COLLINS
207-780-3257
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

NIKHIL J PATHAK
defendant

ALTON C. STEVENS, Esq.
[COR LD NTC]
MARDEN, DUBORD, BERNIER &
STEVENS
44 ELM STREET
P.O. BOX 708
WATERVILLE, ME 04903-0708
873-0186

USA
movant

DAVID R. COLLINS
(See above)
[COR LD NTC]

=====

NIKHIL J PATHAK
counter-claimant

ALTON C. STEVENS, Esq.
[COR LD NTC]
MARDEN, DUBORD, BERNIER &
STEVENS
44 ELM STREET
P.O. BOX 708
WATERVILLE, ME 04903-0708
873-0186

v.

KATHLEEN L LYONS
counter-defendant

RICHARD L. O'MEARA
773-5651
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR]
MEHNERT LAW OFFICES
P.O. BOX 1253
BOSTON, MA 02117
(617) 572-9285

=====

RANDY LYONS
plaintiff

RICHARD L. O'MEARA
773-5651
[COR LD NTC]
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR LD NTC]
MEHNERT LAW OFFICES
P.O. BOX 1253
BOSTON, MA 02117
(617) 572-9285